

December 28, 2018

Via Email and Certified Mail

Superintendent Genie Gee
Mingus Union High School District
1801 E. Fir Street
Cottonwood, Arizona 86326
ggee@muhs.com



Re: School Identification Policy

P.O. Box 17148
Phoenix AZ 85011
(602) 650-1854
acluaz.org

Dale Baich
President

Alessandra Soler
Executive Director

Dear Ms. Gee:

The ACLU of Arizona writes on behalf of Jennifer Lansman and her daughter Jordan Pickett to demand that Mingus Union High School District #4 ("MUHSD" or "District") cease the practice of forcing students who do not have the required credits for advancement to the next grade level to wear distinct badges that divulge their educational achievement level to students, teachers, school administrators, and the public. MUHSD's policy violates the Family Educational Rights and Privacy Act ("FERPA"), Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. If the District does not cease the school's current identification badge policy and take necessary steps to protect the private educational information of students, we will be forced to pursue further action.

Background

As we understand the facts, at the beginning of the 2018-2019 academic year, Mingus Union High School implemented a policy that designates the color of students' ID cards based on their personal academic information. Mingus High School's "scarlet badge" policy requires 11th and 12th grade students, including Jordan, to wear special identification cards with bright red backgrounds and large numbers identifying the student's expected grade level if the student has not passed a class or otherwise completed a certain amount of credits. These badges contrast with the grey-background badges worn by Jordan's peers. The policy requires Jordan and all other similarly situated students to wear "scarlet badges" at all times while at school, forcing struggling students to reveal their private academic information to

classmates, teachers, school administrators, and members of the public without the student or their parents' consent.

Not surprisingly, students forced to wear the bright red badges have experienced increased bullying, public ridicule, and shaming by other students and teachers. Jordan has heard other students call classmates wearing the scarlet badge “stupid” and “problem kids.” Jordan reports that because of wearing the scarlet badge, she receives less individual instruction from teachers because they assume she is not interested, motivated, or capable of learning. This all causes Jordan to experience increased anxiety at school, feel ostracized from other students, and feel stigmatized by teachers and administrators.



Jordan and other students raised their concerns regarding the policy with the MUHSD school board on September 13, 2018. In their statements, the students spoke of their experiences being bullied and harassed, and the discriminatory effect that the policy had on students with disabilities. In response, Mingus High School changed one student's badge from red to grey. Unfortunately, the District failed to repeal the policy, and the practice of forcing students to publicly reveal their private academic information continues. Jordan and other students deserve to attend school without being branded by administrators and bullied by fellow classmates. MUHSD's current policy violates federal law and must immediately cease.

I. The Family Education Rights and Privacy Act (“FERPA”) Prohibits the District from Revealing Students' Private Information

MUHSD's current policy violates the Family Educational Rights and Privacy Act (“FERPA”). FERPA provides that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein) . . . of students without the written consent of their parents to any individual, agency or organization.” 20 U.S.C. § 1232g(b)(1). FERPA defines “education records” as “records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 USCA § 1232g(a)(4)(A). Courts have found that a “plain reading of FERPA's statutory language reveals that Congress intended for the definition of education records to be broad in scope.” *Bryner v. Canyons Sch. Dist.*, 351 P.3d 852, 857 (Utah Ct. App. 2015) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring)). Accordingly, education records encompass a variety of personal information, from disciplinary records to grade point averages to video images to fingerprints. *See United States v. Miami*

Univ., 294 F.3d 797 (6th Cir. 2002) (disciplinary records are education records); *Owasso Independent Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (unlike a student assignment, a grade point average is a maintained education record); *Bryner*, 351 P.3d at 857 (video images with sufficient personally identifiable information are education records); 34 C.F.R. § 99.3 (the definition of “personally identifiable information” under FERPA includes biometric records such as fingerprints, DNA, and handwriting).



Classmates, the public, non-educational school staff, and teachers and school administrators who do not have a “legitimate educational interest” in obtaining student private educational records and information are not authorized to view student records or information without express written consent. 20 U.S.C. § 1232g(b)(1)(A)-(L). By compelling students to wear their educational records and information on visible identification badges, MUHSD’s current policy **requires** the release of private education records without consent, in violation of FERPA. The public display of student education records through the creation of “scarlet badges” exemplifies the type of student privacy violation that spurred the passage of FERPA and must immediately cease.

II. MUHSD’s “Scarlet Badge” Policy Violates the Rights of Students with Disabilities

MUHSD’s policy is particularly egregious in its treatment of students with disabilities. Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Title II of the Americans with Disabilities Act of 1990 (“Title II” or “ADA”) prohibit discrimination on the basis of disability in public schools. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). Both Title II and Section 504 prohibit public entities from excluding or otherwise intentionally discriminating against a disabled person in the provision of services, programs, or activities. 42 U.S.C.A § 12132; *Duvall*, 260 F.3d at 1135, 1138 (9th Cir. 2001). A school violates Section 504 and the ADA by showing that if it was deliberately indifferent to discrimination resulting from the student’s disability. *Id.* at 1139. Deliberate indifference means (1) that the school was aware of the need for an accommodation, and (2) the harm was not the result of negligence but rather resulted from the school’s deliberate behavior. *Id.*

Both prongs are clearly satisfied with respect to the District’s policy. The implementation of the “scarlet badge” policy is a result of the District’s deliberate decision-making and in no way a result of accident or negligence. MUHSD has been on notice since the board meeting on September 13, 2018, that the “scarlet badge” policy unfairly discriminates against students with disabilities. The policy prohibits disabled students who are forced to wear the “scarlet badge” from receiving certain

privileges afforded other students, like the right to leave campus, while also leading to increased bullying and stigmatization of disabled students. Since receiving notice of the policy's discriminatory effects, the District has taken no steps to repeal the policy and has purposely applied the policy to students with disabilities despite knowing that the practice has a discriminatory effect. MUHSD's continued application of the "scarlet badge" policy is unlawful and must be immediately halted.

III. MUHSD's "Scarlet Badge" Policy Violates the Equal Protection Clause of the Fourteenth Amendment

Finally, the policy of publicly shaming high school students who are underperforming academically violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. at 216 (1982) (citation omitted). A policy that does not implicate a protected class may still violate the Equal Protection Clause if it constitutes an illegitimate government objective or if the means employed to achieve the objective are not rationally related to the objective. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-447 (1985). Forcing low-performing students to publicly display their academic information serves no legitimate educational interest nor is it rationally related to an important educational goal.

Policies which are not supported by sound theory and rely on vague and overbroad justifications serve no legitimate interest. *Id.* at 450. We can think of no legitimate interest that would make this policy lawful. Furthermore, a policy that violates federal law serves no legitimate end. *Id.* at 447-48. ("[S]ome objectives ... are not legitimate state interests."). Thus, because the District's policy violates FERPA, it is also unconstitutional. Additionally, even a classification that "neither burdens a fundamental right nor targets a suspect class" must still bear a "rational relationship to some legitimate end." *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 107 (3d Cir. 2008) (citation omitted). "Although this is a low threshold, the Supreme Court has nonetheless instructed that 'even in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be obtained.'" *Id.* at 107-08 (citation omitted); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating statute because it "lacks a rational relationship to legitimate state interests"); *Ledezma-Cosino v. Lynch*, 819 F.3d 1070, 1075 (9th Cir. 2016) ("The absence of a rational relationship between a medical disease and bad moral character therefore renders any classification based on that relationship a violation of the Equal Protection Clause.").



The District's "scarlet badge" policy, in which it publicly identifies and shames underperforming students, does not bear a rational relationship to a legitimate educational interest. Singling out students who are struggling academically for public ridicule does not improve educational achievement. In fact, it does just the opposite.

Because the District's "scarlet badge" policy is unlawful, the ACLU of Arizona demands that the District end it immediately. Please respond to this letter by January 15, 2019, indicating whether the District will end the policy.



Sincerely,

A handwritten signature in blue ink that reads "Kathleen Brody".

Kathleen E. Brody
Legal Director, ACLU of Arizona

cc:

Mingus Union High School District Board:

Anita Glazar, President
Lori Drake, Vice President
Steve Gesell, Member
James Ledbetter, Member
Anthony Lozano, Member